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No. 03-831

Supreme Court, U.S.
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In the Supreme Court of the United States

RANGER CELLULAR AND
MILLER COMMUNICATIONS, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

PETITION FOR *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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PARTIES AND RULE 29.6 DISCLOSURES

The parties before the United States Court of Appeals for the District of Columbia Circuit were Petitioners Ranger Cellular ("Ranger") and Miller Communications, Inc. ("Miller"), the Federal Communications Commission ("FCC") and United States of America.

Ranger is a general partnership without any subsidiaries, parent companies or affiliates which have issued shares or debt securities. Miller is a closely held Florida corporation without any subsidiaries, parent companies or affiliates which have issued shares or debt securities.

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ARGUMENT IN REPLY

This reply will address briefly the four points submitted by the FCC and Solicitor General (collectively, "the FCC") in opposition to the Petition for Writ of Certiorari filed by Ranger Cellular and Miller Communications, Inc. ("Petitioners"). The FCC argues that this case has little significance because, although thousands of applications may have been dismissed by the FCC in contravention of the statute, only two applicants have challenged that action in court. Next it argues that the Court cannot review the Court of Appeals' failure to follow *Chevron*[1] because that issue was not pressed below. Then it argues that, although it declared the statute at issue "plain on its face," the FCC nevertheless did go through a process of interpreting an ambiguous statute which was subject to judicial deference. Finally, the FCC suggests that its ultimate decision was consistent with precedent and did not hinge on a post-hoc distinction offered to the appellate court to justify the outcome. As will be shown, all of these contentions are flatly erroneous.

A. This Case Is Important Both With Respect to the Misuse of Legislative History to Override Statutory Text and With Respect to the Application of the *Chevron* Doctrine

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[1] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

The FCC tries to minimize the significance of this case by noting that only two of the thousands of applicants who were unlawfully dismissed by the FCC have pursued the matter in Court. The fact that an administrative agency chose to ignore an express Congressional directive regarding the treatment of several thousand pending applications should be a matter of serious concern regardless of the larger implications of the case, but those implications are large indeed. To suggest that, because the case only involves two applicants for eight markets, it has no significance outside the circumstances presented is like saying that *Marbury v. Madison*[2] just involved four office seekers and a statute that applied only to a finite set of government appointees. Let there be no mistake that the principles at stake here are important ones.

First, no one reading the plain text of the statute would ever conclude that it extended only to broadcast applicants. As Petitioners demonstrated at length in their petition, Congress invariably and expressly identifies broadcast licenses by name when it intends statutory provisions to apply only to those stations. Here it not only did not do so, but it used language that expressly includes non-broadcast stations. The only conceivable way that you could take this statute and decide that it applies only to broadcast stations is by using a sentence of the legislative history to add a limitation hinted at in the Conference Report but not actually adopted by Congress. The over-reliance on legislative history as a substitute for statutory text is an abuse of statutory construction which this Court has tried to eradicate. The issue is squarely and dramatically raised by the circumstances of this case, and it presents an excellent opportunity to provide guidance to lower courts on this

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[2] 5 U.S. (1 Cranch)137 (1803).

issue.

Second, the case raises the issue of the proper course for a reviewing court to follow under the *Chevron* doctrine when a reviewing court overturns an administrative agency's determination that a statute is plain on its face. *Chevron* makes it clear that no "deference" is due to an agency when Congress has plainly spoken to the matter at issue. *Chevron* suggests, but leaves unclear, whether the reviewing court may then simply undertake the interpretation of an ambiguous statute itself or must take some other course. The D.C. Circuit has held that where an agency's determination that a statute is plain on its face is wrong, the case will be remanded to the agency to undertake an interpretation.[3] The course followed by the D.C. Circuit here – overruling the administrative finding of non-ambiguity but then deferring to the agency's interpretation – made no sense at all under any view of the analysis required by *Chevron*. Obviously, clear guidance from this Court on a situation which commonly occurs is required.

B. The Court of Appeals Erroneously Applied *Chevron* in a Way Not Adopted by the Commission

The FCC argues that Petitioners did not raise at the Court of Appeals the issue of whether *Chevron* Step I or Step 2 was to be followed, and therefore the issue is not reviewable here. The FCC's point directly underscores the nub of Petitioners' grievance. The FCC Order under review expressly found that Section 309(l) is "plain on its face." (Pet. App at 36) Petitioners also believed that the statute

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[3] *Cajun Electric Power Coop, Inc. v. F.E.R.C.*, 924 F. 2d 1132, 1136 (D.C. Cir. 1991).

was plain on its face, but with the opposite meaning from that adopted by the FCC. The appeal was therefore presented to the Court of Appeals as a pure Chevron Step I case. (See Appellants Brief at 19-20) In its opposing appellate brief, the FCC for the first time disavowed the agency's plain-on-its-face determination and instead began to argue that the court should defer to the FCC's "interpretation" of an ambiguous statute. This was, of course, an entirely new foundation for the FCC action which was raised in its responsive brief by counsel. It is no wonder, then, that Petitioners opposed that contention for the first time in their Reply Brief to the Court of Appeals; that was the first time the agency had even hinted that its earlier finding of non-ambiguity, as set forth in its Report and Order, was no longer operative.

Faced with an agency which was rapidly backtracking on the sole basis for its interpretation of the statute, the Court of Appeals should either have remanded the case or interpreted the statute itself. It did neither. Petitioners could hardly have anticipated that the Court would go off on a tack that both overruled the Commission's finding that no interpretation was needed but at the same time deferred to the agency's interpretation – an interpretive exercise which would have been unlawful given the agency's declaration that the statute was plain on its face. This created, in technical terms, an entirely new mess. Petitioners timely sought rehearing, which the Court of Appeals declined. The only avenue for redress of the Court of Appeals' error is review by this Court.

C. The FCC Cannot Simultaneously Find a Statute Unambiguous and Interpret the Statute as Ambiguous

The FCC appears to be arguing here that, despite its declaration that the statute is plain on its face, it nevertheless *did* undertake an expert interpretation of the statute which is now entitled to *Chevron* deference. This argument exemplifies the eel-like slipperiness of the FCC's positions. *Chevron* contemplates a rather simple two-pronged analytic process for construing statutory language: if the statute is clear on its face (i.e., if Congress has directly spoken to the issue) that ends the matter. No interpretation by the agency is necessary or even appropriate. If, on the other hand, the statute is silent or ambiguous on the point in issue, then the agency may use its expertise to fill in the blanks left by Congress. The *Chevron* analysis is logically an either/or proposition. An agency cannot say that a statute is unambiguous and at the same time offer an expert interpretation of its ambiguity. The Court of Appeals bought this logical impossibility, but this Court should not.

D. The Court of Appeals Improperly Accepted a Post-Hoc Explanation for the Agency's Deviation From Its Consistent Precedent

In the rulemaking proceedings before the FCC, Petitioners demonstrate that never in the twenty years surveyed had the FCC dismissed a group of pending applications simply because it was changing the licensing method in mid-stream. So long as the underlying nature of the licenses in issue was remaining constant, the FCC has always preserved the "cut-off" status of the original timely filers and permitted them alone to vie for the license under the new methodology. The FCC *Report and Order*, somewhat astoundingly, denied that it had ever even applied these precedents. (Pet. App. at 40-41) Just prior to this decision in the case at bar, the FCC had resolved the question of how to treat pending broadcast

applications which had, like the application here, migrated in mid-stream from one licensing method to an auction method. In that proceeding[4] the FCC decided that it would be inequitable to open the process to new filers given the possibility of delay and the fact that the original filers had filed with the expectation that they would only have to compete against people who had timely filed during the original window. This case had been affirmed by the Court of Appeals and appeared to be precisely on point in every pertinent particular with the case here. Although repeatedly pointed to as the controlling precedent for the FCC to follow, the FCC did not address it all, much less distinguish it.

The Court of Appeals recognized that a recent, apparently controlling administrative precedent could not simply be ignored. It therefore accepted FCC appellate counsel's suggestion that the broadcast case was distinguishable because in the broadcast case there were no interim operators and therefore there was a greater need for expedition than in the cellular case. The FCC itself had offered no such distinction. (Indeed, as a matter of fact, there *were* interim operators on at least some of the broadcast licenses.[5] The danger of appellate courts accepting post hoc rationalizations is that they can easily get the facts wrong). The FCC here ignores the problem and instead tries to argue that there were other public interest-

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[4] *Implementation of Section 309(j) of the Communications Act, Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses and Issues, Regarding Comparative Hearings*, 13 F.C.C.R. 15920, 15958-60 (1998).

based grounds to arrive at the conclusion it did. As long as we operate under a rule of law where precedent must be followed or deviations explained, the FCC's violation of that principle cannot stand.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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